A

Henry Ong Keng Sem v Patrick Ong King Kok

B

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–117 OF 2000
KANG HWEE GEE J
29 FEBRUARY 2008

C

Civil Procedure — Pleadings — Slander — Whether words complained of should be set out verbatim — Whether defendant prejudiced

D

Tort — Defamation — Qualified privilege — Police investigation — Whether statement made to police during investigation defamatory — Whether protected by qualified privilege — Whether statement made with malicious intent

E

Tort — Defamation — Slander — Whether actionable per se — Exceptions — Whether slander imputing that a person committed a crime of a nature that exposed him to corporal punishment was one of exceptions

F

Tort — False imprisonment — Defendant gave statement to police — Plaintiff arrested by police acting on own accord — Subsequently unconditionally released — Whether defendant instigator, promoter or inciter — Whether defendant liable for false imprisonment

G

The plaintiff and the defendant were brothers. On 18 February 1994, the defendant was shot three times by an unknown person and he was rushed to the Johor Specialist Hospital where he was attended to on an emergency basis. According to a police officer, Inspector Chong, he managed to see and speak to the defendant in the emergency ward and he was informed by the defendant that the plaintiff had caused him to be shot. This was denied by the defendant. As a result of the same, the plaintiff was detained for four days and three nights for investigation and he was then unconditionally released. The plaintiff initiated the present suit and claimed against the defendant for defamation by slander and false imprisonment.

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Held, allowing the plaintiff's application with costs:

(1) Unlike libel, slander is not actionable per se. It requires proof of special damage as an ingredient of the action — with a few well defined

exceptions. A slander imputing that a person committed a crime of a nature that exposes him to corporal punishment is one of the exceptions (see para 23).

(2) There could be no doubt that the statement was made in a privileged occasion and therefore constituted qualified privilege. A grievous crime of attempted murder had been committed upon the defendant. He had been shot three times. He owed a duty to himself and to the public at large to report a crime and in this case to Inspector Chong as soon as possible in order that the perpetrator can be apprehended and brought to justice. It was his privilege to tell Inspector Chong the name of any person whom he suspected may have committed the offence in order to enable the police to start its investigation on a firm footing. Inspector Chong had a corresponding duty to receive the statement from him. It would be up to the police after due investigation whether or not to arrest the person or persons mentioned by the defendant. The statement could not therefore form the basis of an action in defamation (see para 35).

(3) The defence of absolute privilege was unavailable to the defendant as such privilege could be claimed only in circumstances where public policy regarded the interest of society to free speech has paramount. At common law they are limited to such statements made in Parliament or a State Legislative Assembly, during a court or Royal Commission of Inquiry proceedings and in official communications relating to affairs of state. The submission that giving a statement to the police was an extension of a court proceeding and was therefore absolutely privileged was untenable (see para 37).

(4) The complaint of the plaintiff was based on what Inspector Chong told him and not what he himself heard from the defendant. They could not therefore be set out verbatim. Only the gist of what was said can be pleaded as the plaintiff did in para 10 of the statement of claim (see para 39).

(5) Even assuming that the defendant did say the alleged words to Inspector Chong, it was clear that the alleged statement was made pursuant to a serious crime being committed on himself. He could not under the circumstances, be the instigator, promoter or inciter and certainly could not have been actuated by malice. He had a duty to himself and society at large to inform the police whom he suspected of having committed such a crime. The plaintiff's claim on false imprisonment failed (see para 41).

[Bahasa Malaysia summary

Plaintif dan defendan adalah adik-beradik. Pada 18 Februari 1994, defendan

telah ditembak tiga kali oleh seorang yang tidak dikenali dan telah dikejarkan ke Hospital Pakar Johor di mana beliau telah dirawat secara kecemasan. Menurut seorang pegawai polis bernama Inspektor Chong, beliau dapat berjumpa dan bercakap dengan defendan dalam wad kecemasan dan beliau telah diberitahu oleh defendan bahawa plaintif yang menyebabkan beliau ditembak. Ini dinafikan oleh defendan. Akibatnya, plaintif ditahan selama empat hari dan tiga malam untuk penyiasatan dan kemudian beliau telah dibebaskan tanpa syarat. Plaintif memulakan guaman ini dan menuntut terhadap defendan untuk fitnah lisan (slander) dan pemenjaraan yang salah.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Bukan seperti libel, slander tidak boleh didakwa per se. Ia memerlukan bukti ganti rugi khas sebagai bahan untuk perbuatan tersebut — dengan beberapa pengecualian jelas. Slander yang mengaitkan seorang melakukan satu jenayah yang bersifat mendedahkan beliau kepada hukuman jasad adalah salah satu dari pengecualiannya (lihat perenggan 23).

(2) Tidak ada keraguan bahawa kenyataan tersebut dibuat dalam keadaan terlindung dan oleh itu membentuk perlindungan bersyarat. Jenayah besar berupa cubaan bunuh telah dilakukan ke atas defedan. Beliau telah ditembak tiga kali. Beliau bertanggungjawab terhadap dirinya dan orang awam untuk melaporkan jenayah dan dalam kes ini kepada Inspektor Chong secepat mungkin supaya penjenayah itu dapat ditangkap dan dibawa ke pengadilan. Adalah haknya untuk memberitahu Inspektor Chong nama sesiapa sahaja yang beliau syaki yang mungkin telah melakukan kesalahan itu supaya membolehkan polis memulakan penyiasatan berdasarkan asas yang kukuh. Inspektor Chong mempunyai tanggungjawab sepadan untuk menerima kenyataan darinya. Ia bergantung kepada polis setelah siasatan yang sepatutnya sama ada atau tidak untuk menahan orang atau orang-orang itu yang dinyatakan oleh defendan. Kenyataan tersebut oleh itu tidak boleh membentuk asas bagi tindakan dalam fitnah. (lihat perenggan 35).

(3) Pembelaan keistimewaan mutlak tiada bagi defendan kerana keistimewaan sedemikian hanya boleh dituntut dalam keadaan di mana polisi awam meletakkan kepentingan masyarakat untuk kebebasan bersuara sebagai paling utama. Dalam *common law* ia terhad kepada kenyataan yang dibuat dalam Parlimen atau Dewan Undangan Negeri, semasa prosiding mahkamah atau prosiding Suruhanjaya DiRaja Siasatan dan dalam hubungan rasmi berkaitan urusan negeri. Hujah bahawa kenyataan yang diberikan kepada polis merupakan lanjutan

prosiding mahkamah dan oleh itu adalah suatu keistimewaan mutlak tidak dapat dipertahankan (lihat perenggan 37).

(4) Aduan plaintif adalah berdasarkan kepada apa yang diberitahu oleh Inspektor Chong kepadanya dan bukan apa yang beliau sendiri dengar daripada defendan. Ianya oleh itu tidak boleh diambil sepatah demi sepatah. Hanya intipati apa yang dipercakapkan boleh diplid seperti yang plaintif lakukan dalam perenggan 10 penyataan tuntutan (lihat perenggan 39).

(5) Malah dengan menganggap bahawa defendan sememangnya menyebut perkataan-perkataan yang didakwa tersebut kepada Inspektor Chong, adalah jelas bahawa kenyataan yang didakwa tersebut dibuat berikutan jenayah serius yang dilakukan ke atasnya. Beliau tidak boleh dalam keadaan itu, menjadi pemula, penganjur atau penghasut dan sememangnya tidak boleh didorong oleh dengki. Beliau mempunyai tanggungjawab ke atas dirinya sendiri dan masyarakat keseluruhannya untuk memaklumkan kepada polis siapa yang beliau syaki melakukan perbuatan jenayah tersebut (lihat perenggan 41).]

Notes

For cases on arrest by police, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 638–639.

For cases on libel and slander, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 528–532.

For cases on pleadings in general, see 2 (1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5186–5821.

For cases on qualified privilege, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 576–590.

Cases referred to

Abu Samah bin Omar v Zainal bin Montel [2004] 5 MLJ 377 (refd)

Davidson v Chief Constable of North Wales & Anor [1994] 2 All ER 597 (refd)

Harris v Warre (1879) LR Vol IV 125 (refd)

Hoe Thean Sun & Anor v Lim Tee Keng [1999] 3 MLJ 138 (refd)

Ismail bin Shamsudin v Abdul Aziz bin Abdan and other suits [2007] 3 MLJ 512 (refd)

Karpal Singh a/l Ram Singh v DP Vijandran [2001] 4 MLJ 161 (refd)

Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283 (refd)

Martin Rhienus v Sher Singh [1949] MLJ 201 (refd)

Methuram Dass v Jaggannath Das ILR Calcutta Series Vol XXVIII 794 (refd)

Mohamed Lajan v Daud [1963] MLJ 209 (refd)

Pullman v Hill & Co [1891] 1 QB 524 (refd)

Legislation referred to

Rules of the High Court 1980 O 78 r 3

Thara Singh Sidhu (Kushvinder Singh with him)(Thara Singh Sidhu & Kushvinder) for the plaintiff.

Ahmad Redza Abdullah (Yau Her Lerk with him) (Shahrizat Rashid & Lee) for the defendant.

Kang Hwee Gee J:

THE CASE FOR THE PLAINTIFF

[1] The plaintiff's claim against the defendant is two-fold:

(i) defamation by slander; and

(ii) false imprisonment.

THE BACKGROUND

[2] The parties are brothers. On 18 February 1994 at about 11pm when the defendant was shot three times by an unknown person while he was returning home to his house at Jalan Straits View, Johor Bahru. He was rushed to the Johor Specialist Hospital where he was attended to on an emergency basis. He was hospitalised for nine days and was soon recovered.

[3] At the hospital he was attended to by a specialist Dr Ismail bin Abdullah (DW3) at approximately 12 midnight after having been attended to by a medical officer for a short while. Dr Ismail immediately sent the defendant for x-ray and ultrasound in order to locate the bullets in his body. At about 2am the defendant was wheeled to the operation theatre to be operated upon by Dr Ismail himself.

[4] Surgery lasted approximately one and a half hours under general anaesthesia. He was then admitted to Intensive Care Unit where he remained for several days.

[5] Inspector Sundralingam (PW2) the investigating officer had arrived at the hospital to investigate the case and managed to see the defendant very briefly just before he entered the operation theatre. He had managed to ask the defendant how he was and received only a nod in return. The defendant was in a state of pain and was unable to talk.

[6] Another police officer Inspector Chong Seng Ming (PW1) was ordered by the OCPD of Johor Bahru Dato' Zakaria bin Mohammed (PW5) to

commence investigation and see the victim at the hospital. According to Inspector Chong he managed to see and speak to the defendant and got the details of the incident from the defendant even before he was x-rayed. This was denied by the defendant, his daughter and his son who claimed they were present at the hospital. They were stationed close to the defendant when he was being attended to at the Emergency Ward which according to Dr Ismail no visitors were allowed in.

[7] According to Dr Ismail the defendant was in a critical condition and was gasping for breath when he first saw him. His lungs were filled with blood and his blood pressure was 80/60.

[8] According to Inspector Chong he briefed Dato' Zakaria (PW5) the day after the shooting (19 March 1994) of his interview with the defendant at the hospital wherein he was informed by the defendant that the plaintiff had caused him to be shot. This was confirmed by Inspector Chong. Following this briefing Dato' Zakaria ordered Inspector Chong to arrest the plaintiff which he did on 4 March 1994 when the plaintiff surrendered himself before him.

[9] The plaintiff was detained for four days and three nights until his unconditional release on 7 March 1994 on the instruction of OCPD Zakaria. The defendant was called to attend before OCPD Zakaria, Inspector Chong and Inspector Sundra on 6 March 1994 wherein he had made a statement with respect to the shooting.

THE ALLEGED DEFAMATORY WORDS

[10] The plaintiff's claim on defamation is premised on the statement allegedly given by the defendant to Inspector Chong when he saw him before he underwent surgery at the hospital. This was as stated in his witness statement Question 14 as follows:

> 14. Q: What did you say to Henry Ong?
>
> A: I narrated to the plaintiff what the defendant had said to me and that the plaintiff hired someone to kill the defendant and also the defendant having valuable assets worth millions and RM60m worth of property which included 100 acres of land and two hotels which were left by their father who passed away in 1963 and he became a beneficiary of the said estate and if the defendant died the plaintiff would take steps to take all the assets of the defendant as the defendant's children were still very young.

[11] The truth or untruth of the statement it was alleged, was soon publicised in Tangkak home town of the plaintiff to the effect that the

plaintiff had caused the defendant to be shot by reason of some property disputes within the family.

THE ALLEGED FALSE IMPRISONMENT

[12] The plaintiff's claim on false imprisonment is premised on the unlawful arrest and detention of the plaintiff for 72 hours as a consequence of the allegation.

THE CASE FOR THE PLAINTIFF

[13] The plaintiff relies on the testimony of the following witnesses:

Inspector Chong (PW1)

[14] According to Inspector Chong who gave evidence for the plaintiff the defendant had made the statement to him when he was at the emergency room of the hospital. Inspector Chong did not say that he was the first police officer to have arrived at the hospital but he said he rushed to the Johor Specialist Hospital where the defendant was admitted and he interviewed the defendant. Wong Keng Jee, the parties' sister (PW7) had also claimed in her evidence that Inspector Chong was there to interview the defendant.

Ong Heng Ling (PW6)

[15] He corroborates the evidence of Inspector Chong. He had accompanied the plaintiff to the police station together with his mother when the plaintiff surrendered himself to OCPD Zakaria. He was with Inspector Chong in the room when Inspector Chong questioned the plaintiff. Ong Heng Ling was the brother of the plaintiff. This was what Ong Heng Ling said:

> 5. Q: What happened there when you went in?
>
> A: Inspector Chong on seeing Henry straight away blasted him and said loudly, 'why you send someone to murder your brother?' 'You are an unscrupulous businessman'. He also used foul language to scold Henry. After blasting him, he started asking questions and recorded the Question and Answer in our presence.
>
> 6.Q: What are the questions?
>
> A: In short, it is about Henry trying to steal his property and if he is killed, Henry would benefit and the figure he mentioned is 200 million worth of assets and family assets of 60 million when my father passed away comprising of two hotels and 100 acres of plantation. After interviewing Henry, Henry was handcuffed and sent to the lock up.

OCPD Dato' Zakaria (PW5)

[16] He corroborates Inspector Chong's evidence that he had sent him to investigate the shooting and was informed the next day that the defendant had informed him that the suspect was his younger brother, the plaintiff and that he instructed Inspector Chong to arrest the plaintiff. He said that the plaintiff was released after the defendant was asked to verify what he allegedly informed Inspector Chong before himself, Inspector Chong and Inspector Sundra that his brother the plaintiff was responsible for the shooting and that the allegation was baseless.

Inspector Sundralingam (PW2)

[17] He said he was the investigating officer in this case and confirmed that after due investigation he concluded that the defendant's allegation against the plaintiff was false and there was no truth in the plaintiff hiring someone to kill the defendant and consequently the plaintiff had to be released. In cross-examination he reiterated that the defendant did tell him that the plaintiff could be the main suspect as the person who caused him to be shot.

Wong Keng Jee (PW7 sister of the plaintiff)

[18] She said she came to know through the defendant's first wife that the plaintiff was the person who caused the shooting. In essence she said that DW2 and DW4 brought her to the hospital in their car. When reached the hospital to the emergency room she saw two detectives at the door and she was not allowed to go in and Inspector Chong was inside talking to the defendant. When Inspector Chong (PW1) left, she went in together with DW2 and DW4 and spoke to her brother and he narrated about the shooting incident. He also gave her his belongings which she subsequently gave to the 1st wife. He could understand her. Then he was taken to the X-ray room and later to the operating theatre and she stayed there till 5am After he was out of the ICU, she used to visit him daily. Rosalind Ong (DW2) did say she saw her after the x-ray was taken but before the defendant was being operated, although George Ong (DW4) had said he never saw PW7 there until surgery was over.

Plaintiff himself

[19] He was informed by Inspector Razakruddin from Muar Police Station that there was a warrant of arrest and that he was supposed to arrest him and bring him to Johor Bahru but advised him to go to Johor Bahru to surrender himself. He went there on 4 March 1994 with his mother and Albert Ong (PW6) where he met OCPD Zakaria at the police station and OCPD

Zakaria told Inspector Chong who was with him at that time to investigate the matter. He was arrested and brought to Inspector Chong's room and he was followed by his mother and brother. He was accused by Inspector Chong of sending people to kill his brother because the plaintiff wanted the family inheritance of the father and the defendant's property worth RM200m. He was then sent to be detained in Tampoi Police Station and later to Ibu Pejabat Kontinjen, Johor where he was detained for four days and three nights.

THE DEFENCE

(1) The alleged interview by Inspector Chong of the defendant at the hospital never took place. Dr Ismail (DW3) had testified that no persons were allowed to visit the patient during that time prior to surgery and that the patient (defendant) was in no position to speak in view of the critical condition he was in. He said the defendant was in a state of shock, blood pressure 80/60, and although he was coherent he was in shock. He saw the defendant at approximately 12 midnight. (The defendant was brought in into the hospital 15 minutes earlier according to his medical report.) The defendant was on drips and oxygen mask. Rosalind Ong (DW2) the eldest daughter said that on being informed by phone by the defendant himself who had at that time had just been shot rushed to the hospital with her brother George Ong (DW4) and they had arrived before Dr Ismail. She could see from a distance her father being treated at the emergency ward. She confirmed that no one had interviewed her father at that time or any time thereafter until the next morning. She said her father was not in a position to talk and nobody was allowed to see him except doctors and nurses. She confirmed that Inspector Chong was not seen at the place. She had stayed at the hospital all the while her father was being attended and operated upon until the next morning.

The evidence of Wong Keng Jee (PW7) claiming that she saw Inspector Chong at the hospital at the relevant time should not be accepted as she should not be believed having claimed that she had arrived at the hospital by car driven by Rosalind Ong (DW2) and George Ong (DW4) and when both these witnesses had denied giving her a lift to the hospital. Wong Keng Jee should not also be believed having said that she had entered the emergency ward where she was able to talk to the defendant with respect to how he was shot and that the defendant had handed over his personal belongings to her, given the state of shock that he was in. Further her identification of Inspector Chong was unworthy of credit given that she had seen

Inspector Chong for the first time at the hospital and had seen him again at the court ten years later. A

(2) Inspector Chong's evidence should not be believed. His evidence is inconsistent with the evidence of OCPD Zakaria with respect to his testimony that one day prior to the release of the plaintiff, the plaintiff was interrogated and based on that interrogation the plaintiff was released, whereas Inspector Chong said in cross-examination that intelligence report from the Secret Society Branch had confirmed that the plaintiff was not involved. B

(3) Inspector Sundra himself as the investigating officer in this shooting case had confirmed that he did not interview the defendant that night at the hospital. He had arrived just before the defendant underwent surgery. He said he never saw Inspector Chong there although he cannot confirm whether Inspector Chong was there before him. Inspector Sundra was able to record the statement from the defendant three days later after he was discharged from the hospital, 3 March 1994. C D

(4) Lau Hian Wan (PW3) and Goh Ah Bah (PW4)'s evidence with respect to the publication of defamatory statement on the shooting implicating the plaintiff was unreliable. Mr Lau merely heard rumours from coffee shop which rumours were allegedly spread by Terry Hoo (DW5) and Julie Ong (DW6). Similarly with Mr Goh (PW4) — only heard rumours. There is no evidence before the court to prove that the defendant had ever directed Terry Hoo and Julie Ong to spread the rumours in the first place. E F

(5) In summary the defendant's stand is that he never gave Inspector Chong the interview at the hospital. DW2 and DW4 who arrived at the hospital even prior to Dr Ismail corroborate the defendant's denial as Inspector Chong was not seen there according to their evidence. This is also in line with the medical evidence given by Dr Ismail that the defendant was in no position to talk. It is also impossible for Wong Keng Jee (PW7) to have seen and talked to the defendant at that point of time considering the condition that the defendant was in. Both Terry Hoo and Julie Ong who gave evidence for the defendant denied that they ever spread rumours incriminating the plaintiff with the shooting. G H

(6) The plaintiff's claim should fail for not having stated the actual words spoken in his statement of claim. Pleading in the statement of claim is defective. See para 15 — sets out parameter of plaintiff's I

claim for slander – allegation that defendant had during the period of detention of plaintiff, the defendant procured Julie Ong Guat Goh and Terry Hoo Huang Seng to spread the allegation in the town of Tangkak, the home town of the plaintiff, that the plaintiff had hired somebody to kill the defendant. In a defamation suit the actual words complained of and not merely their substance must be set up verbatim in the statement of claim. See O 78 r 3 of the Rules of the High Court 1980. See *Halsbury's Laws of Malaysia* Vol 2 [2004] at p 507 — 'the actual words required to be stated in the statement of claim'. See *Abu Samah bin Omar v Zainal bin Montel* [2004] 5 MLJ 377 at Held (2) and (3) — failure to state actual words made it impossible to decide whether the words are defamatory. The law is clear — actual words must be reproduced in slander action. Otherwise fatal. See also *Harris v Warre* (1879) LR Vol IV 125.

(7) *Defence of absolute privilege*: statement made to police — See *Martin Rhienus v Sher Singh* [1949] MLJ 201 approving *Methuram Dass v Jaggannath Das ILR Calcutta Series Vol XXVIII 794* on the reasoning that giving a statement to police is an extension of giving evidence in court — therefore absolute privilege (it said 'not actionable at all').

(8) Also qualified privilege – see David Price in book *Defamation Law, Procedure and Practice* (2nd Ed) — moral or legal duty to answer enquiries by those charges with the detection of crime. The person who answers the question of a police officer is protected by qualified privilege and in certain circumstances by absolute privilege.

(9) Publication — the only instance of publication was from the defendant to Inspector Chong which we deny. The subsequent 'publications' from Inspector Chong to OCPD Zakaria and the IO Sundra were repetition by Inspector Chong.

(10) Also what Inspector Chong said to the plaintiff in front of PW6 (brother) and mother in his room when the plaintiff surrendered himself on the 4 March 1994 — these are repetitions.

(11) False imprisonment: This is sustainable only if the defendant is a complainant and was the instigator, promoter and active inciter of the arrest and imprisonment. It is for the police to investigate. The test is laid down in *Davidson v Chief Constable of North Wales & Anor* [1994] 2 All ER 597 per Sir Thomas Bingham MR LJ at Held — store detective complained to police did not incite or cause the arrest of suspect plaintiff. Mere information to police is not sufficient.

(12) Also see *Mohamed Lajan v Daud* [1963] MLJ 209 per Gill J — test: did he directly or immediately cause imprisonment unless actuated

by malice? Based on public policy — no complainant will lodge report if they fear the backlash of a legal suit.

FINDINGS AND DECISION

What is defamation?

[20] An unprivileged false statement that injures a person's reputation and exposes him to public hatred, contempt, ridicule, or condemnation in the minds of right thinking members of society. The statement is a libel if it is published in written words; and slander if it merely spoken as in the present case (summarised and simplified for the purpose of this judgment from the introductory chapter in *Gatley on Libel and Slander* (8th Ed)).

What the plaintiff needs to prove?

[21] The High Court case of *Ismail bin Shamsudin v Abdul Aziz bin Abdan and other suits* [2007] 3 MLJ 512 sets out the requirements as follows:

> Elements Of Defamation
>
> Harking back to the elements of defamation as contained in the Defamation Act 1957, it is trite law that the plaintiff bears the burden of proving that:
>
> (1) the words are defamatory;
>
> (2) they refer to the plaintiff; and
>
> (3) the words are published (per Mohamed Dzaiddin J (later Chief Justice (Malaysia) in *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315).
>
> In *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283 Ramly Ali J restated these principles as follows:
>
> ... the plaintiff must prove three elements of the tort of defamation which are:
>
> (i) the plaintiff must show that the statement bears defamatory imputations;
>
> (ii) the statement must refer to or reflect upon the plaintiff's reputation; and
>
> (iii) the statement must have been published to a third person by the defendant.

Are the alleged words defamatory?

[22] The words complained of were clearly meant to say that the plaintiff had committed a serious crime. There could be no doubt that they were capable of injuring the plaintiff's reputation and exposes him to public contempt, hatred, ridicule, or condemnation. They were therefore defamatory.

Is the alleged slander actionable per se?

[23] Unlike libel slander is *not actionable* per se. It requires proof of special damage as an ingredient of the action — with a few well defined exceptions. A slander imputing that a person committed a crime of a nature that exposes him to corporal punishment is one of the exceptions. The law considers such slander so outrageously injurious that damage is to be presumed. The alleged slander in the instant case falls under this category of slander *actionable per se*, that is to say, not requiring proof of special damage.

Whether there was publication?

[24] As a person's reputation depends upon how that person is perceived by others, it follows that for the tort of defamation to be established, the defamatory material must have been communicated (or published) to a third party other than the plaintiff. Lord Esher in *Pullman v Hill & Co* [1891] 1 QB 524 at p 527 defined 'publication' in this way:

> What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself.

[25] The fact that the alleged defamatory words were uttered to Inspector Chong if proved, is sufficient to constitute publication.

Whether the defendant made the statement?

[26] The defendant had denied that he had made the statement complained of at the hospital to Inspector Chong.

[27] The issue that I must first address is necessarily causal in nature, that is to say, to find whether the defendant had or had not made that statement. If indeed the defendant had not made that statement that would be the end of the matter. The plaintiff would not have proved his case. If on the other hand the defendant had made the statement to Inspector Chong as he

described there would be a need to proceed to the next step of determining whether the defendant can avail himself of any defence.

[28] Inspector Chong was adamant that the defendant did give him the statement when he was at the emergency room of the hospital. He stood his ground upon being cross-examined. His presence at the hospital at that room was corroborated by the evidence of Wong Keng Jee the sister of both the plaintiff and the defendant. She had arrived at the hospital by car together with Rosalind Ong (DW2) and George Ong (DW4) (both children of the defendant). She could not approach the defendant as two police detectives who were at the door did not allow her to go in but was certain that she saw Inspector Chong speaking to the defendant in that room.

[29] On the other hand the defendant himself had denied that he had ever met Inspector Chong at the hospital at any time before he underwent surgery. He testified that he was in such a bad shape physically having been shot three times and was in no position to talk. His testimony is corroborated by both DW2 and DW4 (his children) who were sure that no one had interviewed their father the defendant at that time or any time thereafter and that Inspector Chong was never seen at or around the area.

[30] Having heard the opposing evidence of the witnesses I am of the view that it is more probable than not that the defendant did not give the statement (the subject of this defamation suit) to Inspector Chong at the hospital on the following ground.

[31] Dr Ismail, the surgeon, who conducted the surgery on the defendant confirmed that the defendant was in such a poor condition when he saw him at the emergency room at approximately 12 midnight just 15 minutes after the defendant was brought in. According to Dr Ismail on the day in question, he received a call from the hospital and saw the defendant at 12 midnight. This was what Dr Ismail said:

> The defendant had suffered gunshot injury and had three shots in the chest, right arm and the shoulder region. At that time he was in the state of shock. He was coherent but in the state of shock. Blood pressure 80/60 which is below the normal. He was conscious but in a lot of pain. His blood pressure was low at approximately 80/60. He was in shock and looking very pale.

[32] Considering the seriousness of the injury on the defendant as described by Dr Ismail, the defendant's condition could not have been any better before Dr Ismail saw him to be able to communicate with Inspector Chong as he had claimed. The evidence of the sister Wong Keng Jee is in my view unreliable as both DW2 and DW4 (the children of the defendant) who

came together with her were sure no one was able to enter the room where the defendant was. The evidence of the OCPD Zakaria cannot be used to corroborate Inspector Chong's testimony that such a statement was made to him at the hospital, as clearly it is purely a repetition. At most the repetition can constitute proof of publication.

Whether the defendant can avail himself of the defence of qualified privilege?

But even assuming that the plaintiff is able to prove on a balance of probability that the defendant did make the damaging statement to Inspector Chong, he should nevertheless be able to raise a defence of qualified privilege.

[33] The law on qualified privilege is set out in *Clerk & Lindsell on Torts* (8th Ed, 2000) Sweet & Maxwell at pp 1166–1168 as follows:

> *Qualified privilege*
>
> The definition of 'qualified privilege' may be gathered from the words of a well-known judgment:
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> > In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits. per curiam, *Toogood v Spyring* (1834) 1 CM & R 181 at p 193; see per Lindley LJ, in *Stuart v Bell* [1891] 2 QB 341 at p 345; *Adam v Ward* [1917] AC 309.
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> A more recent definition, possibly to be preferred as it refers to a duty or interest to make the communication rather than to an interest in its subject matter, per Greene MR in *De Buse v McCarthy* [1942] 1 KB 156 cf *Harrison v Bush* (1855) 5 E & B 344 at p 348, per Lord Campbell CJ; *Pullman v Hill & Co* [1891] 1 QB 524 at p 528, per Lord Esher MR; *Watt v Longsdon* [1930] 1 KB 130 at p 147, per Scrutton LJ; *While v Stone (Lighting and Radio) Ltd* [1939] 2 KB 827 ('the person to whom it is made', in Lord Atkinson's statement, refers to the third party other than the plaintiff to whom the alleged defamatory statement is published); *Phelps v Kemsley* (1942) 168 LT 18 at p 20, per Goddard LJ is to be found in the speech of Lord Atkinson in *Adam v Ward* [1917] AC 309 at p 334:
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> > A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or

> moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

Elements of qualified privilege

There are three elements necessary to establish the defence of qualified privilege: (1) the occasion must be fit, (2) the matter must have reference to the occasion, and (3) it must be published 'from right and honest motives'. See *Horrocks v Lowe* [1975] AC 135, HL (burden of proof on the plaintiff that publication was not 'from right and honest motives'). Also *Reynolds v Times Newspapers* [1999] WLR 1010.

Unreasonable use of privileged occasion

Once it is ruled that the occasion is privileged and that the matter complained of has reference to the occasion, the only remaining question for consideration is whether the occasion was used without malice. *Adam v Ward*, above; *Angel v HH Bushell & Co Ltd* [1968] 1 QB 813. In *Clark v Molyneux* (1877) 3 QBD 237 it was held that statements made on a privileged occasion will be protected, provided it does not appear that the defendant acted from any indirect motive. The actual decision was not on the question of privilege, but on the question of malice, and the burden of proving this was held to lie on the plaintiff per Lindley LJ in *Stuart v Bell* [1891] 2 QB 341 at p 351. cf *Darby v Ousely* [1856] 1 H & N 1:

> I apprehend the moment the judge rules that the occasion is privileged, the burden of showing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown on the plaintiff. *Clark v Molyneux* (1877) 3 QBD 237 at p 247, per Brett LJ.

[34] In my judgment, there could be no doubt that the statement was made in a privileged occasion and therefore constitutes qualified privilege. A grievous crime of attempted murder had been committed upon the defendant. He had been shot three times. He owed a duty to himself and to the public at large to report a crime and in this case to Inspector Chong as soon as possible in order that the perpetrator can be apprehended and brought to justice. It was his privilege to tell Inspector Chong the name of any person whom he suspected may have committed the offence in order to enable the police to start its investigation on a firm footing. Inspector Chong had a corresponding duty to receive the statement from him. It would be up to the police after due investigation whether or not to arrest the person or persons mentioned by the defendant. The statement could not therefore form the basis of an action in defamation.

(See also the case of *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 3 MLJ 138 where KN Segara J (as he then was) held that statements made in a police report are statements made in a privileged occasion and the privilege is qualified.)

[35] But a statement made in a privileged occasion would not provide a defence if it is actuated by malice. It is pertinent to note that the relationship between the plaintiff and the defendant had been strained. This was admitted by the plaintiff himself in paras 14, 15, 16 and 17 of his written statement. It is clear to me that (assuming again that the defendant did give the statement which he denied) there was a good ground for defendant to have suspected the plaintiff as the person who caused him to be shot in view of the bitter relationship that they were in. There could therefore be no question of any malicious intent on the part of the defendant to have made that statement implicating the plaintiff and to be denied of the defence of qualified privilege.

[36] The defence of absolute privilege, needless to say, is unavailable to the defendant as such privilege can be claimed only in circumstances where public policy regards the interest of society to free speech paramount. At common law they are limited to such statements made in Parliament or a State Legislative Assembly, during a court or Royal Commission of Inquiry proceedings and in official communications relating to affairs of state. The submission that giving a statement to the police is an extension of a court proceeding and is therefore absolutely privileged is untenable.

Whether the plaintiff's claim should fail for not having stated the actual words spoken in his statement of claim?

[37] The issue can be resolved by referring to the decision of the Court of Appeal in *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161 where the defamatory words complained of in a press statement failed to state the actual words:

> Held, dismissing the appeal on liability and allowing the appeal on quantum:
>
> There is neither statutory provision nor rules of court that the actual words must be pleaded *in toto* failing which the action fails. The court must look at the purpose, what prejudice it causes to a defendant in putting up his defence, in short the justice of the case. Where the libel turns on the meaning of a particular word or words, of course the words must be pleaded so that the word used can be understood in the proper context it was used. In the present case, the court were concerned with statements of facts. There were no two meanings to them. It was not even challenged before the court that they have other meanings. There was clearly no prejudice to the appellant. In the circumstances, the court found that even though the press statement was not quoted *in toto* in the statement of claim, the failure to do so, in the circumstances of this case, was not fatal (see p 178D–G).

[38] Here in the instant case it is clear there could be no prejudice to the defendant. It is to be noted that the complaint of the plaintiff is based on what Inspector Chong told him and not what he himself heard from the defendant. They could not therefore be set out verbatim. Only the gist of what was said can be pleaded as the plaintiff did in para 10 of the statement of claim. Further, the nature of the defamatory words had been made known to the plaintiff in advance as this had been set out in Question 14 of the written statement of Inspector Chong (which should be considered a part of the pleading). They constitute the slander as narrated by the defendant to the said Police Inspector at the hospital and if proven to have been said is certainly capable of being defamatory. The defendant's submission on this issue is untenable.

False imprisonment

[39] The test to apply here is as submitted by counsel for the defendant:

(i) whether 'the defendant was the instigator, promoter and active inciter of the arrest and imprisonment' as laid down in *Davidson v Chief Constable of North Wales & Anor* [1994] 2 All ER 597; and

(ii) did he directly or immediately cause the imprisonment and was he actuated by malice as laid down in *Mohamed Lajan v Daud* [1963] MLJ 209.

[40] Even assuming that the defendant did say those words to Inspector Chong at the hospital it is clear that the alleged statement was made pursuant to a serious crime being committed on himself. He could not under the circumstances, be the instigator, promoter or inciter and certainly could not have been actuated by malice. He has a duty to himself and society at large to inform the police whom he suspected of having committed such a crime. As Gill J said in *Mohamed Lajan*, unless there are valid grounds to do so, it is a matter of public policy not to entertain such a claim — for no complainant will ever make a statement or lodge a report if they fear the backlash of a legal suit.

[41] The plaintiff's claim on false imprisonment fails.

[42] The plaintiff's suit is dismissed with costs.

Enclosure 60: Application by the plaintiff to amend statement of claim to include the alleged defamatory words.

[43] After this judgment had been prepared in draft but before it could be delivered, the plaintiff made an application (encl 60) to amend his statement of claim to insert a new para 10A to include the actual words spoken of the alleged slander as follows:

> 10(A) In order that there may be no doubt as to the defamatory words used [which tallies with the evidence given in court by Insp Chong, plaintiff, Ong Heng Ling and Insp Sundralingam] at the interview between Inspector Chong and the defendant, it is apt to quote the conversation that took place between them as narrated in evidence by Inspector Chong:
>
> I asked the defendant who does he suspect that tried to shoot to kill him. He insisted it was Henry Ong.
>
> The defendant said that his brother Henry Ong Keng Sem residing in Tangkak is the one who hired someone to kill him.
>
> I asked him why do you suspect your brother Henry Ong and the defendant said that he had valuable assets worth millions and also he has property worth RM60m which included 100 acres of land and two hotels which were left by their father who passed away in 1963 and he became a beneficiary of the assets.
>
> The defendant said that upon his death the plaintiff will take steps to take all the assets of the defendant as his children were still very young.
>
> I narrated to the plaintiff what the defendant had said to me and that the plaintiff hired someone to kill the defendant and also the defendant having valuable assets worth millions and RM60m worth of property which included 100 acres of land and two hotels which were left by their father who passed away in 1963 and he became a beneficiary of the said estate and if the defendant died the plaintiff would take steps to take all the assets of the defendant as the defendant's children were still very young.

[44] The date fixed for the decision had to be postponed to a date to be fixed to allow the plaintiff's application to be heard.

[45] After hearing the parties on encl 60, I reserve my decision so that it could be delivered together with the judgment.

[46] The plaintiff is in fact merely endeavouring to include in its statement of claim the very words which had already been set out in the written statements of Inspector Chong and the other witnesses which had been served on the defendant. The defendant was not taken by surprise that would prejudice his defence. The amendment would not under the circumstances require any change in the direction or strategy of his defence that would require new evidence to be adduced.

[47] The application is allowed. Costs of this application to the defendant in any event.

Application allowed with costs.

Reported by Brendan Navin Siva